Court File No. CV-12-453025.00CP

ONTARIO

SUPERIOR COURT OF JUSTICE

B E T W E E N:

ASHLYN O'MARA

Plaintiff

- and -

AIR CANADA,
JOHN DOE #1 and JOHN DOE #2

Defendants

Proceeding under the Class Proceedings Act, 1992

STATEMENT OF CLAIM

TO THE DEFENDANTS

A LEGAL PROCEEDING HAS BEEN COMMENCED AGAINST YOU by the Plaintiff. The claim made against you is set out in the following pages.

IF YOU WISH TO DEFEND THIS PROCEEDING, you or an Ontario lawyer acting for you must prepare a Statement of Defence in Form 18A prescribed by the rules of court, serve it on the Plaintiff's lawyer or, where the Plaintiff does not have a lawyer, serve it on the Plaintiff, and file it, with proof of service, in this court office, WITHIN TWENTY DAYS after this Statement of Claim is served on you, if you are served in Ontario.

If you are served in another province or territory of Canada or in the United States of America, the period for serving and filing your Statement of Defence is forty days. If you are served outside Canada and the United States of America, the period is sixty days.

MAY-07-2012 12:17 THOMSON ROGERS LAW 416 868 3134 P.002/018
MAY-07-2012 12:09 P.02

Instead of serving and filing a Statement of Defence, you may serve and file a Notice of Intent to Defend in Form 18B prescribed by the rules of court. This will entitle you to ten more days within which to serve and file your Statement of Defence.

IF YOU FAIL TO DEFEND THIS PROCEEDING, JUDGMENT MAY BE GIVEN AGAINST YOU IN YOUR ABSENCE AND WITHOUT FURTHER NOTICE TO YOU. IF YOU WISH TO DEFEND THIS PROCEEDING BUT ARE UNABLE TO PAY LEGAL FEES, LEGAL AID MAY BE AVAILABLE TO YOU BY CONTACTING A LOCAL LEGAL AID OFFICE.

ISSUE DATE: May 7, 2012 Issued by _____
Local Registrar

Address of court office:

10th Floor
393 University Avenue
Toronto, Ontario
M5G 1E6

TO: **AIR CANADA**
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Saint-Laurent, Quebec
H4S 1Z3

TO: **JOHN DOE #1**
c/o Air Canada
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TO: **JOHN DOE #2**
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CLAIM

1. The PLAINTIFF, ASHLYN O'MARA, claims on behalf of herself and on behalf of the Class:

(a) general damages and special damages in the amount of $10,000,000.00;

(b) punitive, aggravated and exemplary damages in the amount of $10,000,000.00;

(c) a declaration that any settlement and/or release entered into or signed by any member of the Class with Air Canada prior to April 16, 2012 is invalid and void ab initio;

(d) prejudgment and post judgment interest pursuant to the provisions of the *Courts of Justice Act*, R.S.O. 1990, c. C.43, as amended;

(e) costs of this action on a substantial indemnity basis, including Harmonized Sales Tax; and,

(f) such further and other relief as this Honourable Court may deem just.

THE PARTIES

2. The plaintiff, Ashlyn O'Mara resides in the City of Toronto, in the Province of Ontario. On January 13, 2011, Ashlyn O'Mara was a passenger on Air Canada flight 878 ("AC878") travelling from Lester B. Pearson Airport in Toronto, Ontario to Zurich, Switzerland.

3. The defendant, Air Canada, is a corporation carrying on business pursuant to the laws of Canada with its head office located at 7373 Côte-Vertu Blvd. West, Saint Laurent, Quebec, H4S 1Z3. Air Canada maintains business premises in Ontario and throughout Canada as a commercial air carrier. Air Canada operated AC878 as a regularly scheduled commercial flight.

4. At all materials times, Air Canada was the employer of the pilots operating AC878 (together the "Flight Crew"), including but not limited to the captain John Doe #1 (the "Captain") and the first officer, John Doe #2 (the "First Officer"), and is therefore, vicariously liable for the acts and omissions of the Flight Crew.

5. The defendant, John Doe #1, was at all material times the Captain in command on AC878. The name of the Captain has not been disclosed at the time of issuing this pleading.

6. The defendant, John Doe #2, was at all material times, the First Officer on AC878. The name of the First Officer has not been disclosed at the time of issuing this pleading.

7. In bringing this action on behalf of a class of approximately 95 persons in Canada and abroad who were passengers on AC878 (the "Class" or "Class Members"), to be further defined in the motion for certification, the Plaintiff pleads and relies upon the provisions of the *Class Proceedings Act, 1992,* S.O. 1992, c.6, as amended.

THE EVENTS OF AIR CANADA FLIGHT 878

8. On the evening of January 13, 2011, at approximately 9:38 p.m. eastern standard time, AC878 departed Lester B. Pearson International Airport, in Toronto, Ontario, en route to Zurich, Switzerland with 95 passengers, 6 flight attendants and two flight crew members on board.

9. At or around 12:40 a.m. on the morning of January 14, 2011, the First Officer expressed to the Captain a need for rest and went to sleep.

10. At or around 1:55 a.m. on January 14, 2011, the Captain made a mandatory position report with Shanwick Oceanic Control with respect to the aircraft's positioning which awoke the First Officer from his sleep of approximately 75 minutes. At the same time, a United States Air Force Boeing C-17 flying westbound at 34,000 feet appeared as a traffic alert and collision avoidance system target on AC878's navigational display. The Captain apprised the First Officer of this traffic.

11. Over the next minute or so, the Captain adjusted the map scale on the navigational display in order to view the traffic alert and collision avoidance system target and occasionally looked out the forward windscreen to acquire the aircraft visually. At or around the same time, the First Officer mistook the planet Venus on the forward windscreen for an aircraft, despite the Captain advising the First Officer that the aircraft of concern was at the 12 o'clock position and 1,000 feet below AC878.

12. The First Officer continued to erroneously interpret the oncoming aircraft's position as being above and descending towards AC878. Without warning he violently forced the aircraft control column forward causing AC878 to enter a sudden and steep dive into the path of the oncoming aircraft. The Captain was forced to execute an emergency recovery manoeuvre to restore the aircraft to straight and level flight at its assigned altitude. This entire terrifying episode lasted approximately 46 seconds (the "Terrifying Episode").

13. As a result of the Terrifying Episode, passengers aboard AC878 were violently shaken and thrown. Many passengers were catapulted into the aircraft's ceiling and interior. Objects were dangerously projected throughout the interior of the aircraft. As described below, Class Members suffered serious physical and psychological injuries.

14. During the remaining three hours of AC878, passengers were terrified and feared for their lives. They were not provided with any explanation for the Terrifying Episode by the Flight Crew.

15. Following the landing of AC878 on January 14, 2011, Air Canada spokesman Peter Fitzpatrick claimed that the Terrifying Episode occurred when AC878 hit some unexpected turbulence.

16. No further explanation for the Terrifying Episode was ever offered to any Class Member or to the public by Air Canada.

17. Following AC878 and prior to April 16, 2012, in response to complaints made by passengers, the defendant, Air Canada, sought and obtained releases from some Class Members in exchange for modest compensation. The release demanded by Air Canada included an indemnity provision purporting to make the claimant an insurer of Air Canada for any additional claims brought. At no time prior to the releases being executed did Air Canada disclose the true cause of the Terrifying Episode of which it was aware. Furthermore, Air Canada failed to correct the misleading statement made by its spokesperson on January 14, 2011.

18. On April 16, 2012, the Transportation Safety Board of Canada published a report (the "Report") finding that the Terrifying Episode was not caused by turbulence but was in fact caused by the inappropriate actions of the First Officer.

19. The Plaintiff and Class Members suffered damages which were a direct result of the Terrifying Episode and the negligence/tortuous conduct of the Defendants, the particulars of which are set out below.

LEGAL BASIS FOR CLAIMS AGAINST AIR CANADA & THE FLIGHT CREW

20. Air Canada entered into contracts of international carriage with each of the passengers on AC878 including the Plaintiff, Ashlyn O'Mara.

21. The contracts of international carriage and the liability of Air Canada and its employees are governed in part by the provisions of the *Carriage by Air Act,* R.S. 1985, c. C-26, as amended.

22. The Plaintiff pleads and relies upon the provisions of the *Carriage by Air Act,* R.S. 1985, c. C-26, as amended including, in particular, Articles 17 and 21 of the Montreal Convention and articles 17, 22, and 25 of the Warsaw Convention.

23. The events of AC878 as described above, constitute an accident within the meaning of Article 17 of the Montreal Convention and Article 17 of the Warsaw Convention and accordingly the defendant, Air Canada, is liable to its passengers for damage sustained in case of bodily injury upon the condition only

that the accident which caused the injury took place on board AC878 or in the course of any of the operations of embarking or disembarking.

24. In the event that bodily injury of any passenger's claims governed by the Montreal Convention exceeds $100,000.00 Special Drawing Rights, the Plaintiff states that the Terrifying Episode was caused by the negligence of Air Canada and its employees including the First Officer and the Captain, and accordingly, Air Canada cannot avail itself of any of the limits on liability under Article 21 of the Montreal Convention.

25. The Plaintiff pleads that the Defendants were negligent and in breach of their contractual duties to the Class as set out below:

A. AS AGAINST THE DEFENDANT, AIR CANADA:

a) failing to establish procedures for identifying fatigued flight crew prior to traveling;

b) failing to establish a "fit to fly" checklist to enable employees and the Flight Crew to self monitor others in order to identify Flight Crew who are not efficiently alert to perform their duties;

c) failing to implement or consider the need to implement a policy, system or procedure to ensure that sleep taken by Flight Crew while in-flight is done in a manner than minimizes the risks of the flight;

d) failing to have a policy mandating appropriate communication between members of the Flight Crew and/or failed to enforce any such policy;

e) failing to abide by or enforce any such policy, system or procedure for ensuring that sleep taken by Flight Crew while in-flight is done in a manner that minimizes the risks of the flight;

f) failing to implement, or consider the need to implement a policy, system or procedure for monitoring periods of sleep taken by Flight Crew in order to ensure the Flight Crew's alertness while in-flight;

g) failing to abide by or enforce any such policy, system or procedure for monitoring sleep taken by the Flight Crew while in-flight;

h) failing to implement or consider the need to implement a policy, system or procedure to ensure that Flight Crew who are just awakening from sleep, and suffering from sleep inertia, are not permitted to operate a plane;

i) failing to abide by or enforce any such policy, system or procedure designed to ensure that Flight Crew suffering from sleep inertia are not permitted to operate a plane;

j) failing to design an adequate training program for Flight Crew with respect to safety measures to be taken while sleeping in-flight including the general principles of fatigue, fatigue risk management and fatigue counter measures;

k) failing to require the attendance of Flight Crew in any training programs with respect to safety measures to be taken while sleeping in-flight including the general principles of fatigue, fatigue risk management and fatigue counter measures;

l) failing to abide by and ensure that its servants, agents and/or employees abide by the *Canadian Aviation Regulations,* SOR/96-33 *(*under the *Aeronautics Act, RSC 1985, c. A-2)* and the *Commercial Air Service Standards (CASS)* with respect to controlled rest;

m) failing to employ reasonable, responsible, competent and/or adequate servants, agents or employees to operate AC878;

n) failing to ensure that passengers were reasonably safe while aboard AC878; and,

o) negligently, recklessly and/or improperly failing to advise Class Members of the true cause of the Terrifying Episode.

B. AS AGAINST THE FIRST OFFICER AND THE CAPTAIN, FOR WHOSE NEGLIGENCE THE DEFENDANT, AIR CANADA, IS VICARIOUSLY RESPONSIBLE:

a) operating AC878 in such a manner as to cause the Terrifying Episode;

b) failing to keep the plane under proper control;

c) failing to keep a proper lookout;

d) failing to communicate relevant information appropriately between themselves;

e) failing to take reasonable care to avoid the Terrifying Episode;

f) operating AC878 when they knew or ought to have known that, either or both, were unfit to do so while in a state of fatigue;

g) failing to monitor themselves and each other for fatigue before AC878 and/or while operating AC878;

h) sleeping during a period of AC878 when AC878 required the attention of both the First Officer and the Captain;

i) permitting a period of sleep by the First Officer in excess of 40 minutes thus exceeding the limits set by Transport Canada and the *Commercial Air Services Standards (CASS)*;

j) permitting the First Officer to operate AC878 within 15 minutes of awakening from sleep while in a state of "Sleep Inertia," thus breaching the minimum time period for operating an aircraft after sleep, set by Transport Canada and the *Commercial Air Services Standards (CASS);*

k) failing to advise the in-charge flight attendant that a period of sleep was to be taken by the First Officer and/or failing to request that the in-flight attendant call back the Captain and/or First Officer at a specific time to ensure the period of sleep was over as required by Transport Canada and the *Commercial Air Services Standards (CASS)*;

l) failing to abide by the *Canadian Aviation Regulations,* SOR/96-33 *(*under the *Aeronautics Act, RSC 1985, c. A-2)* and the *Commercial Air Services Standards (CASS)* with respect to controlled rest;

m) operating AC878 at an excessive rate of speed considering the circumstances and as such, they could not control AC878 within their range of vision;

n) on the occasion in question both the First Officer and/or the Captain were incompetent pilots lacking in reasonable skill and self-command and ought not to have attempted to operate AC878;

o) creating a situation of emergency, danger and a trap for passengers such that, despite all precautions, they could not extricate themselves;

p) failing to attend, or participate in, any training and/or program offered by Air Canada that provided training on the general principles of fatigue, fatigue risk management and fatigue counter measures;

q) permitting themselves to arrive at such a condition by foregoing sleep, drinking alcoholic beverages, or absorbing drugs such that their normal faculties, perception, will, and judgment were so affected that they no longer had the capacity to operate a plane with the caution characteristic of a reasonably careful pilot who has not foregone sleep, consumed such beverages, or absorbed such drugs;

r) failing to utilize appropriate eyewear when it was reasonably necessary to do so under the circumstances;

s) they were distracted in the moments before the Terrifying Episode occurred;

t) failing to exercise due care and skill in the operation of the plane; and,

u) negligently, recklessly and/or improperly failing to advise Class Members of the true reason for the Terrifying Episode.

26. The Plaintiff further pleads that the Defendants conduct in the circumstances departed to a marked degree from the ordinary standards of behaviour in the circumstances and warrants punitive and/or aggravated and/or exemplary damages. In particular, the Plaintiff alleges that:

a) the Defendants inappropriately and wrongly told Class Members and the public that the Terrifying Episode was caused by turbulence when they knew that not to be the case;

b) the Defendants inappropriately and wrongly failed to correct their report to Class Members and the public that the Terrifying Episode was caused by turbulence once they knew or ought to have known it was not caused by turbulence;

c) the Defendants, or any one of them, actively covered up the true cause of the Terrifying Episode, of which the Defendants, or any one of them, had exclusive knowledge, until the circumstances of

the Terrifying Episode were investigated by and publicly disclosed by the Transportation Safety Board of Canada;

d) they wrongly and inappropriately allowed Class Members to accept compensation and sign releases and indemnity agreements, knowing that Class Members were told and believed the Terrifying Episode was as a result of turbulence and were not aware of the true cause of the Terrifying Episode, while the Defendants at all times were well aware of the true cause of the Terrifying Episode; and,

e) they sought and obtained releases from Class Members prior to April 16, 2012, with respect to injuries and damages sustained from the Terrifying Episode, without disclosing the true cause of the Terrifying Episode to Class Members when the true cause of the Terrifying Episode was known only to the Defendants.

27. In the event that the bodily injury of any passenger whose claim is governed by the Warsaw Convention exceeds 250,000 francs, Air Canada waived this limit when it entered into the Inter-Carrier Agreement on Passenger Liability (IIA) on or about October 14, 1996, such that the limit on liability in Article 22 (1) of the Warsaw Convention does not apply.

28. Alternatively, in the event that Air Canada has not waived the limits on bodily injury claims prescribed under Article 22(1) of the Warsaw Convention, the Plaintiff and Class Members damages were sustained from actions and omissions by Air Canada and its employees, including the Captain and First Officer, which were done with the intent to cause damage or alternatively, were done recklessly with knowledge that damage would result, such that the limits on liability in Article 22(1) of the Warsaw Convention do not apply. Particulars of the acts or omissions are outlined above.

DAMAGES

29. As a result of the Terrifying Episode, the Plaintiff, Ashlyn O'Mara, and Class Members sustained permanent and serious personal, physical and psychological injuries.

30. The Plaintiff, Ashlyn O'Mara, sustained damage to her musculoskeletal system including, bruising, tearing, straining and damaging of the nerves, muscles, tendons and ligaments throughout her body. In addition, the Plaintiff Ashlyn O'Mara suffered from and continues to suffer from psychological injury, including increased anxiety flying.

31. Class Members sustained permanent and serious physical and psychological injuries as a result of the Terrifying Episode including, but not limited to, musculoskeletal system injuries, anxiety, depression, post traumatic stress disorder, fear of flying, fatigue, nightmares and insomnia. These injuries and impairments have been accompanied by pain, suffering and a loss of enjoyment of life.

32. Further, as a result of the Terrifying Episode, the Plaintiff and Class Members will be required to undergo medical treatment, medical tests and procedures and ingest medication. Ashlyn O'Mara and Class Members have been put to medical, hospital, rehabilitative, health care and other out-of-pocket expenses and claim for these past and future expenses arising as a result of their injuries.

33. The damages sustained by the Plaintiff and Class Members include but are not limited to special and general damages for pain and suffering,

physical and emotional losses, as well as loss of earnings and earning capacity, monetary damages and medical and other bills and expenses.

34. Some of the expenses related to the medical treatment that the Plaintiff and Class Members have undergone, and will continued to undergo, have been borne by the various provincial health insurers including the Ontario Health Insurance Plan ("OHIP"). As a result of the negligence of the Defendants, the various provincial health insurers have suffered and will continue to suffer damages.

35. The Plaintiff claim that the conduct of the Defendants, as set out herein, warrants an award of punitive, aggravated and/or exemplary damages and claim damages as set out herein in an amount necessary to punish and deter such inappropriate conduct.

36. The Plaintiff and Class Members plead and rely upon the provisions of the following statutes also, and as amended, and the regulations they are under:

a) *Carriage by Air Act,* R.S. 1985, c. C-26;

b) *Aeronautics Act, RSC 1985, c. A-2.*

c) *Class Proceedings Act*, 1992, S.O. 1992, c.6

d) *Courts of Justice Act,* R.S.O. 1990, c. C.43

e) *Negligence Act,* R.S.O. 1990, c. N.1; and,

f) *Occupiers' Liability Act,* R.S.O. 1990, c.O.2.

JURISDICTION

37. The Plaintiff and Class Members plead and rely on Article 33 of the Montreal Convention and are bringing this action before a Court of the Domicile of Air Canada, in a place where the Plaintiff's contract with Air Canada was entered into, and in the province of the Plaintiff's principle and permanent residence such that this Court has jurisdiction over this action.

38. The Plaintiff pleads and relies on section 17(h), (o) and (p) of the *Rules of Civil Procedure*, allowing for service ex juris on the non-Ontario defendant, Air Canada. Specifically, this originating process may be served without Court order outside Ontario, in that the claim is:

(a) In respect of damages sustained in Ontario arising from a tort or breach of contract wherever committed (rule 17.02(h));

(b) Against a person outside Ontario who is a necessary and proper party to this proceeding properly brought against another person served in Ontario (rule 17.02(o)); and,

(c) Against a person carrying on business in Ontario (rule 17.02(p)).

PLACE OF TRIAL

39. The Plaintiff proposes this action on her behalf and on behalf of the Class Members and proposes that a trial in this action take place at the City of Toronto, in the Province of Ontario.

DATE OF ISSUE: The 7 day of May, 2012.

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Court File No. CV-12-453025-00CP

ONTARIO

SUPERIOR COURT OF JUSTICE

Proceeding Commenced at Toronto

STATEMENT OF CLAIM

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